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No. 75-1370

In the Supreme Court of the United States

OCTOBER TERM, 1975

ALBERT PIERRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the district court erroneously denied his petition for a writ of error *coram nobis* filed on the ground that the district court in 1953 failed to comply with Fed. R. Crim. P. 11 in accepting petitioner's plea of guilty.

A seven-count indictment filed in September 1951 in the United States District Court for the Eastern District of Michigan charged petitioner and co-defendant George Farrocco with violations of federal narcotics laws. At their arraignment on July 8, 1953, petitioner and Farrocoo, jointly represented by retained counsel, requested leave to withdraw previously entered pleas of not guilty and to plead guilty to count one, charging conspiracy. (Farrocco also agreed to plead guilty to one substantive count.) In announcing petitioner's desire to enter a plea of guilty to the first count, defense counsel stated,

"The first count is the count which charges a conspiracy" (Pet. App. 13).[1] The court addressed petitioner personally, and petitioner admitted that he was pleading guilty because he was in fact guilty of the "offense set out in the first count of the indictment" (Pet. App. 13). In response to other questions posed by the court, petitioner acknowledged that he had not been pressured into entering the plea, and that he had not received promises or representations that the court would deal with him leniently (Pet. App. 14). The court accepted the plea. On October 2, 1953, petitioner was sentenced to imprisonment for three years, and the government's motion to dismiss the remaining charges was granted.

On May 25, 1972, following a nonjury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to possess, and possession with intent to distribute, 39.8 pounds of heroin, in violation of 21 U.S.C. 841. On June 20, 1972, he was sentenced to concurrent terms of imprisonment for twenty years. The court of appeals affirmed *sub nom. United States* v. *Christophe*, 470 F.2d 865 (C.A. 2), and this Court denied certiorari, 411 U.S. 964.

Thereafter, petitioner filed in the Eastern District of Michigan a petition for a writ of error *coram nobis*. Petitioner alleged that his guilty plea in 1953 had been used to enhance his sentence in 1972, and that it had been entered improperly because the district court had failed to comply with Fed. R. Crim. P. 11, and because his counsel had provided ineffective assistance. The district court denied relief (Pet. App. B), and the court of appeals affirmed (Pet. App. A).

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[1]The transcript of the arraignment has been incorporated into the memorandum opinion of the district court (Pet. App. B).

Although he no longer challenges the effectiveness of counsel, petitioner continues to maintain that the district court did not comply with Rule 11 and that the noncompliance requires vacation of the 1953 guilty plea. At the time of the plea, Rule 11 provided, in pertinent part:

> A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge.

The transcript of the plea-taking proceedings demonstrates that the plea of guilty had been voluntarily entered; petitioner focuses upon the failure of the court to ask questions specifically designed to demonstrate that petitioner understood the nature of the charge. But courts in 1953 were not required to make this determination by personal inquiry. See *United States* v. *Swaggerty*, 218 F.2d 875 (C.A. 7), certiorari denied, 349 U.S. 959; cf. *McCarthy* v. *United States*, 394 U.S. 459, 462 n. 4. Thus, the courts below properly could point to other factors, apparent from the record, which strongly indicated that petitioner was aware of the charge to which he pleaded guilty. Petitioner had been represented by experienced counsel for a lengthy period before the plea was entered. He originally had pleaded not guilty to the seven counts in the indictment, all charging violations relating to narcotics. When petitioner changed his mind, he specified that the plea would be entered to the "offense set out in the first count of the indictment," thereby giving the court reason to believe that he was aware of the contents of the indictment. This reason was bolstered by the fact that defense counsel remarked that the charge was "conspiracy."

Petitioner does not claim that he was in fact unaware of the nature of the charge. His complaint is founded solely upon the failure of the record expressly to reflect his apparent awareness. Thus, he alleges no constitutional defect in his plea and for that reason would not be entitled to collateral relief, in our view, even were he still serving his sentence. Moreover, in *United States* v. *Morgan*, 346 U.S. 502, 511, the Court said the common-law petition for writ of error *coram nobis* is an "extraordinary remedy" to be afforded "only under circumstances compelling such action to achieve justice."[2] Given the facts of the 1953 case and the then-prevailing standards, the refusal of the courts below to grant the extraordinary relief, more than two decades after entry of petitioner's guilty plea, was correct and need not be reviewed by this Court. Cf. *Gundlach* v. *United States*, 262 F. 2d 72 (C.A. 4), certiorari denied, 360 U.S. 904; *McCall* v. *United States*, 256 F.2d 936 (C.A. 4); *United States* v. *Swaggerty*, *supra*; *Taylor* v. *United States*, 182 F.2d 473 (C.A. 9), certiorari denied, 340 U.S. 836.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

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[2]The facts in this case are plainly distinguishable from those in *Morgan*, in which petitioner apparently had been convicted without counsel and without any showing that the right to counsel had been waived.

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